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IN THE

Supreme Court of the United States

No. 74-6079

DELBERT BEARD,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 59 Ill. 2d 220 (1974), and is included as an appendix to the petition.

The opinion of the Appellate Court affirming the Circuit Court of Cook County, Criminal Division is reported at 15 Ill. App. 3d 663 (1973) and is also included as an appendix to the petition.

STATEMENT OF JURISDICTION

Jurisdiction in this court has been adequately alleged.

QUESTION PRESENTED FOR REVIEW

Whether due process and equal protection require that a probationer be admonished by the court before an admission of probation violation can be accepted as being knowingly and intelligently given.

STATUTES INVOLVED

Illinois Revised Statutes, Ch. 110 A, sec. 402 (1973) is set out in the petition.

STATEMENT OF THE CASE

The facts of the case are adequately set forth in the petition.

REASONS FOR DENYING THE WRIT

The point of departure on the question of what due process of law requires in probation revocation cases is, of course, the United States Supreme Court case on the subject, *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973). In *Gagnon* the Court held that due process requires (a) notice of the claimed probation violations; (b) disclosure of the evidence against the probationer; (c) an opportunity to be heard and to present witnesses; (d) "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)"; (e) a neutral and detached decision-maker; (f) a written statement by the fact-finder as to the basis for the revocation; and (g) appointed counsel in certain, but not all cases. *Id.* at 786, 790. There has been no allegation—(nor could there have been on the present record)—that the due process safeguards enunciated in *Gagnon* were not met in the instant case. None of the due process requirements of *Gagnon* necessitate or suggest that the equivalent of Illinois Supreme Court Rule 402 be administered at revocation hearings where the probationer does not contest the allegations against him. The American Bar Association Standards are to the same effect. ABA Project On Standards For Criminal Justice, Standards Relating To Probation, § 5.4 (1970).

It is significant that the *Gagnon* Court made no intimation that the dictates of *Boykin* v. *Alabama*, 395 U.S. 238 (1969), had any application to probation revocation proceedings. *Boykin* was the case which enunciated the due process requirements for guilty pleas and which gave rise to Rule 402. Indeed, the *Gagnon* Court implied the opposite when it suggested that even counsel might not be

required in the typical case where "the probationer or parolee has been convicted of committing another crime or has admitted the charges against him." 411 U.S. at 786. If the Court is willing to permit such admissions without even requiring the advice of counsel, it follows that the procedures set down in *Boykin* and Rule 402 would also not be required.

Gagnon v. *Scarpelli*, the landmark case on the question of what due process of law requires at probation revocation proceedings, can only be read as an implicit renunciation of the argument defendant makes in the instant case.

There are at least seven crucial differences, between guilty pleas and admission of probation violations, which mandate a difference between the procedures followed at the arraignment and those followed at the revocation hearing.

1. The due process rights of a probationer at a revocation hearing are, as a general matter, less exacting than those accorded to a defendant in a criminal prosecution. As the United States Supreme Court said regarding the right to counsel at a revocation hearing:

> The differences between a criminal trial and a revocation hearing do not dispose altogether of the argument that under a case-by-case approach there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered only by a lawyer. Without denying that there is some force in this argument, we think it a sufficient answer that we deal here not with the right of an accused to counsel in a criminal prosecution, but with *the more limited due process right of one who is a probationer* or parolee only because he has been convicted of a crime.

Gagnon v. *Scarpelli,* 411 U.S. 778, 789 (1973) (footnote omitted; emphasis added). *See also People* v. *Kostaken,* 16 Ill. App. 2d 395, 398, 148 N.E. 2d 615 (2d Dist. 1957); "A probationer is not in the same category as one charged by indictment or information."

The Court made the proposition clear that the probationers' rights are more limited than those of criminal defendants in a comparison of the rights of probationers to those of juveniles: "A juvenile charged with violations of a generally applicable statute is differently situated from an already-convicted probationer or parolee, and is entitled to a higher degree of protection." 411 U.S. at 789, n. 12. *A fortiori,* the probationer, as a general matter, is entitled to a lesser degree of protection than the criminal defendant.

2. One of the main reasons, of course, that strict safeguards are required regarding a plea of guilty is that the plea gives rise to a loss of liberty. But the deprivation of liberty involved in revocations of probation is less significant than that involved in guilty pleas. In *Gagnon,* the Court quoted with approval (411 U.S. at 781) the following passage from its opinion in *Morrissey* v. *Brewer,* 408 U.S. 471, 480 (1972) on parole revocation, and the *Gagnon* Court went on to hold (411 U.S. at 781-82) that from a due process perspective there are no significant differences between probation and parole revocation.

> Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

Since probation revocations involve only the loss of the conditional liberty properly dependent on observance of special probation restrictions, and since what is at stake

in a criminal prosecution is the absolute liberty to which every citizen is entitled, probation revocations do not involve as severe a deprivation of liberty as does a criminal conviction.

3. A guilty plea entails the waiver of the constitutional right to a jury trial. But an admission of a probation violation does not involve such a waiver, since a probationer has no right to a jury trial (*People* v. *Temple*, 131 Ill. App. 2d 955, 958, 268 N.E. 2d 875 (1971)).

4. A guilty plea entails the additional waiver of the constitutional right to confront and cross-examine adverse witnesses. But an admission of a probation violation involves the waiver of a more limited right. Unlike at a criminal trial, the judge at a probation hearing may, on the basis of "good cause," refuse to allow confrontation. *Gagnon* v. *Scarpelli, supra,* 411 U.S. 778, 786 (1973). Moreover, in the instant case since the State would have proved its case merely by introducing a certified copy of petitioner's bank robbery conviction, the petitioner would have had no one to cross-examine even if he had put the State to its full proof. Therefore, in the instant case petitioner waived no meaningful confrontation right; as a general matter, the most a probationer can waive is a limited confrontation right.

5. The primary reason cited by the United States Supreme Court in *Boykin* v. *Alabama,* 395 U.S. 238 (1969), that strict procedures are required regarding guilty pleas, is that: "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Id.* at 242. In this respect, an admission of a probation violation differs critically from a guilty plea. For, such an admission is completely irrelevant to the

question of whether a conviction is appropriate. Indeed, such an admission does not even make inevitable a revocation of probation.

Although in many cases it ultimately leads to a loss of liberty, an admission of a probation violation is nonetheless significantly different from a conviction. Whereas a conviction is a determination of the far more fundamental and consequential issue of guilt, an admission of a probation violation is relevant only to the question of what sentence is appropriate. Indeed, only after a conviction is obtained, will the question of probation or its revocation even arise. As the United States Supreme Court said in *Gagnon* regarding the rights of probationers, "we deal here not with [an accused's right] in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee *only because* he has been convicted of a crime." 411 U.S. at 789 (emphasis added). An admission of a probation violation, therefore, is critically different from a guilty plea, since the latter, unlike the former, "is itself a conviction" (*Boykin*, 395 U.S. at 242).

6. Furthermore, merely that a defendant has violated probation does not necessarily mean his probation will be revoked. Ill. Rev. Stat. 1971, ch. 38, § 117-3(d) (repealed 1973), under which the defendant's probation was revoked, provided: "If the court determines that a condition of probation has been violated, the court *may* alter the conditions of probation or imprison the probationer . . ." (emphasis added). The Unified Code of Corrections states more explicitly that a violation of probation will not automatically result in a revocation of probation:

> If the court finds that the offender has violated a condition at any time prior to the expiration or termi-

> nation of the period, it may continue him on the existing sentence, with or without modifying or enlarging the conditions, or may impose any othr sentence that was available under Section 5-5-3 at the time of initial sentencing.
>
> Ill. Rev. Stat. 1973, ch. 38, § 1005-6-4(e) (footnote omitted).

Thus, the relationship between an admission of a probation violation and a revocation of probation is not analogous to the relationship between a guilty plea and a conviction. For, whereas a guilty plea "is itself a conviction" (*Boykin*, 395 U.S. at 242), a judge, under our sentencing statutes, may decide not to revoke probation even though there has been a finding of violation of probation. In other words, whereas a guilty plea, ipso facto, gives rise to a conviction ("nothing remains but to give judgment and determine punishment," *Boykin*, 395 U.S. at 242), the decision to revoke probation will be based not only on the circumstances of a violation, but also on additional factors such as whether the probationer has demonstrated such dangerousness that he must be separated from society and whether his prospects for rehabilitation would be enhanced by continuing to allow the defendant to live and work outside prison walls. After a probationer has admitted a violation, his age, his criminal background, the nature of the crime for which he was convicted, as well as other factors, are considered by the judge to determine whether probation should be revoked. None of these factors, however, would be considered before entering judgment upon a plea of guilty; judgment would follow automatically. Therefore, the relationship between an admission of a probation violation and a revocation of probation is not analogous to the relationship between a guilty plea and a con-

viction. An admission of a probation violation is not as decisive, in producing a probation revocation, as a guilty plea is in causing a conviction.

7. Finally, what the State must prove at the usual probation revocation hearing differs significantly from what must be established at the typical criminal trial. At trial, the State must prove beyond a reasonable doubt that the defendant committed every element of the crime charged. This process may involve the examination of numerous witnesses who would attempt to expose criminal transactions, sometimes complex, and usually performed quickly and secretively. At the probation revocation hearing, on the other hand, the factual issues are ordinarily very simple, the proof need only be made by a preponderance of the evidence, and, as in the instant case, the incriminating evidence will be a matter of public record (the conviction for the offense allegedly committed during the probationary period). Thus, whereas with the guilty plea the defendant relinquishes a right to put the State to a very heavy burden of proof, by admitting a probation violation the defendant ordinarily waives merely the formality of the introduction into evidence of a certified copy of the conviction.

There are thus at least seven critical differences between guilty pleas and admissions of probation violations. These differences make unreasonable defendant's argument that pleas of guilty and admissions of probation violations may be equated and that the procedures appropriate to the former would, therefore, also be appropriate to the latter.

Because of two of the seven differences — no right to a jury trial, a limited right to confrontation — the rationale of *Boykin* v. *Alabama, supra,* 395 U.S. 238 (1969), becomes inapplicable to revocation hearings. In *Boykin,* the case

which enunciated the requirement for personal waivers for guilty pleas and which led to the enactment of Rule 402, the Court reached its result because a guilty plea entails the waiver of three important federal constitutional rights — the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. *Id.* at 243. But at a revocation hearing, there is no right to a jury trial, and the right to confrontation is more limited than the Sixth Amendment right accorded criminal defendants. Moreover, regarding the Fifth Amendment privilege, the Illinois Supreme Court has held that, even at a criminal trial where the defendant is entitled to a higher degree of protection than is a probationer at a revocation hearing, judicial admonishments need not precede a waiver of the defendant's right not to incriminate himself. *People* v. *Roberson*, 30 Ill. 2d 168, 195 N.E. 2d 722 (1964). Furthermore, the defendant in the instant case by his admission to a probation violation did not incriminate himself with regard to future criminal prosecutions, since all that he admitted was that he had been convicted of having committed a crime during the probationary period. Moreover, to the extent defendant in the instant case incriminated himself, he did so regarding an event (the conviction for bank robbery) which was a matter of public record anyway. The admission, therefore, was really no more self-incriminatory than a stipulation in a rape case to the defendant's age.

Since, unlike a guilty plea, an admission of a probation violation does not entail the waiver of the three federal constitutional rights relied on in *Boykin*, the personal waiver requirements of *Boykin*, and of Rule 402, should not be required at revocation hearings. As the California Court of Appeal put it:

> The trial involves "the fundamental constitutional right of a person accused of crime to plead not guilty to the charge and have a trial by a jury of his peers wherein he can defend himself by confronting and cross-examining witnesses against him and by presenting witnesses in his own behalf." [Citation.] It is the waiver of the full scope of those rights that must be made by a defendant personally, whereas he may waive part of them by acquiescing by silence in his counsel's conduct. [Citation.] A probation revocation hearing involves some, but by no means all, of the fundamental rights afforded a defendant at trial. Its purpose is not to determine guilt or innocence, but is whether conditions attached to an act of clemency have been met. There is no right to a jury trial. Confrontation in the proceeding is not an absolute right. . . .
>
> We thus conclude that the principles of *Boykin* [and certain California decisions] do not apply to proceedings to revoke probation where the matter is submitted on the report of the probation officer.
>
> *People* v. *Dale*, 112 Cal. Rptr. 93, 95-96 (App. 1973).

In summary, since (1) probationers at a revocation hearing are entitled to a lesser degree of protection than are criminal defendants, since (2) the deprivation of liberty at stake at a revocation hearing is not as great as in a criminal prosecution, since (3) an admission of a probation violation, unlike a guilty plea, does not involve the waiver of the right to a jury trial or (4) the waiver of the Sixth Amendment right to confrontation guaranteed to criminal defendants, since (5) an admission to a probation violation, unlike a guilty plea, does not give rise to a conviction, since (6) such an admission is not as decisive, in producing a probation revocation, as is a guilty plea in causing a conviction, and since (7) an admission of a probation violation, unlike a guilty plea, relieves the State, in the ordinary case, of a burden of proof which would

otherwise readily be met, the admission of a probation violation is an act which deserves far less judicial solicitude than does a guilty plea. Application of the cumbersome Rule 402 at revocation hearings, therefore, would unnecessarily transform what should be a simple, expeditious proceeding into a time-consuming, intricate exercise fraught with arguable grounds for appeal. Administration of the rule at revocation proceedings would thus be both inappropriate and imprudent. "[T]here are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences." *Gagnon* v. *Scarpelli, supra,* 411 U.S. 778, 788-89 (1973).

CONCLUSION

Since the weight of authority and the landmark United States Supreme Court case on the subject oppose petitioner's argument, and since there are crucial differences between a guilty plea and an admission to a probation violation, this court should reject defendant's argument that Illinois Supreme Court Rule 402 should have been applied when defendant admitted that he had violated his probation. When the defendant through his attorney acknowledged that he had been convicted of having committed a bank robbery during the probationary period, the trial judge did not abuse his discretion by revoking defendant's probation. For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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